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'Thornburgh Memo' Rules Killed

*Clinton Staff Retracts Regulations
On Agents' Contact With Suspects*

BY DANIEL WISE

AN ELEVENTH-HOUR effort to cement the controversial Thornburgh memorandum into formal regulations has been scuttled by the incoming Clinton Administration.

The Thornburgh memorandum, issued by former U.S. Attorney General Dick Thornburgh on June 8, 1989, drew fire from the American Bar Association and criminal defense bar associations around the country for claiming that the Justice Department, under the Supremacy Clause, could supplant state disciplinary restrictions on contacts between prosecutors and represented suspects.



Mr. Thornburgh

Through a proposed rule published in the *Federal Register* last Nov. 20, the Bush Administration would have elevated the memorandum to the status of a formal regulation, allowing prosecutors and their agents broad contact with rep-

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Reaction to the Demise Of the 'Thornburgh' Rules

'At a minimum, the rescission of the regulation will allow the organized bar a second chance to make its case to the Clinton Administration that the proper course is for the Justice Department to seek desired exceptions from ethical restrictions rather than attempting to write them itself.'

Gerald Lefcourt, criminal defense attorney

'What was so infuriating about the Thornburgh memorandum [was the assumption that the Justice Department] can determine what's proper conduct and tell its lawyers that they don't have to comply with state ethics rules when there is a conflict.'

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resented suspects prior to the filing of charges in criminal cases and before the start of a lawsuit in civil proceedings. The rule also outlined the circumstances in which direct contact could be initiated after proceedings started.

A final rule was drafted after the receipt of public comments and signed by departing Bush Administration Attorney General William P. Barr on Jan. 14.

The final rule was supposed to have been published in the *Federal Register* on Jan. 19, the day before President Clinton's inauguration, but because of a slip-up it did not appear that day, according to Philip C. Baridon, a policy analyst with the Justice Department's Office of Management and Policy Analysis.

Three days later, on Jan. 22, the proposed regulations were rescinded by Leon E. Panetta, the Clinton Administration's director of the Office of Management and Budget, as part of a directive that rescinded approximately 100 Bush Administration regulations that had not yet been published in final form.

The move leaves the future of the Thornburgh memorandum in doubt. Mr. Baridon, who was listed in the *Federal Register* as the contact for persons interested in commenting on the proposed regulation, said he did not know whether the memorandum was still operative. Mr. Baridon added that "I guess we will not see [the Thornburgh memorandum] in its current form in the near future."

Telephone calls to the department's press office seeking clarification were not answered.

'Second Chance'

"At a minimum," said criminal defense lawyer Gerald Lefcourt, "the rescission of the regulation will allow the organized bar a second chance to make its case to the Clinton Administration that the proper course is for

the Justice Department to seek desired exceptions from ethical restrictions rather than attempting to write them itself."

Mr. Lefcourt, a former leader of the New York Criminal Bar Association, was one of a small number of bar leaders who have met periodically with Bush Administration Justice Department officials over initiatives that were causing widespread concern among defense lawyers.

"What was so infuriating about the Thornburgh memorandum," said William W. Taylor, a former vice chairman of the ABA's Criminal Justice Section, was the assumption that the Justice Department "can determine what's proper conduct and tell its lawyers that they don't have to comply with state ethics rules when there is a conflict."

Direct Contact

ABA Model Rule 7-104, which has been adopted in New York, prohibits lawyers and their agents from direct contact with a person represented by a lawyer on any subject covered by the representation.

The Thornburgh memorandum left prosecutors free to put undercover agents in direct contact with represented suspects in an effort to gather incriminating statements in conflict with the "longstanding understanding" of the criminal defense bar that such direct contacts were barred by the ethics rules, Mr. Taylor said.

The Thornburgh memorandum and the proposed regulation both would have allowed law enforcement personnel to conduct clandestine investigations of suspects, after the filing of charges, concerning attempts at obstruction of justice, unrelated or continuing criminal activity or where there was an imminent threat to life or safety.

"Nobody questions that the Justice Department has true concerns," Mr. Lefcourt said, but the proper course is for them to attempt to get state authorities to recognize appropriate exceptions to the rule.